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No. 306

Office-Supreme Court, U.S.
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SEP 14 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964.

IN THE MATTER

of

CHICAGO EXPRESS, INCORPORATED,

Debtor.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner-Appellant,

CHICAGO EXPRESS, INCORPORATED,

Respondent-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SYDNEY KRAUSE,
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New York, N. Y. 10017

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Respondent-Appellee.

Respondent-Appellee respectfully submits that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on April 24, 1964, should be denied.

Question Presented.

Whether a claim for priority based upon the so-called "six-month rule" can be allowed in a proceeding under Chapter XI (Arrangements) of the Bankruptcy Act.

Statutes Involved.

Sec. 64a. This statute is set forth at length in Appendix A (p. 14) of the petition for the writ.

Sec. 302. "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. . . ."

Sec. 102. "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That . . . section 64 . . . shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. . . ."

Statement.

Chicago Express, Incorporated, Respondent-Appellee, and sometimes referred to herein as the Debtor, filed a petition for Arrangement under Section 322 of the Bankruptcy Act on May 11, 1962. The Debtor was engaged in the interstate trucking business under franchises approved by the Interstate Commerce Commission.

The Pennsylvania Railroad Company (Petitioner-Appellant) and sometimes referred to herein as Pennsylvania, filed a proof of claim seeking a preference for an unpaid debt in the amount of $265,965.75. The consideration for this debt was the furnishing by Pennsylvania of service to the Debtor, prior to the filing of the Arrangement, consisting of "piggy-back" rail carriage of the Debtor's trailers on joint motor hauls.

The Debtor objected to Pennsylvania's claim insofar as it requested priority (8a*). The claim for priority was denied successively by the Referee in Bankruptcy (40a-58a); the District Court (65a-76a) and the Court of Appeals (Appendix B, pp. 17-22 of petition for writ).

Pennsylvania now seeks a writ of certiorari to review the decision and order of the Second Circuit.

Argument.

The decision of the lower court was unanimous. It affirmed the decision reached by the District Court, whose opinion thoroughly considered the authorities, and, in a meticulous and thorough review of the applicable authorities, rejected Pennsylvania's contention that the "six-months rule" was applicable in a Chapter XI proceeding (65a-76a). The District Court, in turn, had affirmed the decision of the Referee in Bankruptcy before whom this matter came in the first instance (40a-49a).

No court by which Pennsylvania's claim for priority has been decided has had any reservations as to the applicability of the priority hierarchy set forth in 64a of the Bankruptcy Act.

The problem, generally, is not one of a frequently recurring nature nor of overriding importance. No valid reason has been adduced to justify further review of the result that has been reached. The decision below is not in conflict with any decision of any other Circuit of the United States Court of Appeals.

The "six-month rule" was formulated by this Honorable Court in a railroad reorganization case.

Fosdick v. *Schall*, 99 U. S. 235 (1879).

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* All page references, unless otherwise indicated, will refer to the appendix of Appellant's brief in the United States Court of Appeals.

In effect, it permitted a preferred or priority status to unsecured creditors whose claims were incurred as operating expenses within six months of the institution of a railroad reorganization proceeding.

The doctrine, although initially confined to railroad reorganization cases, was, by decisions of lower federal courts, extended to claims against public and quasi-public service corporations.

> *Keelyn* v. *Carolina Mut. Tel. & Tel. Co.*, 90 Fed. 29 (C. C. D. S. C., 1898) (telephone and telegraph company);
>
> *Central Trust Co.* v. *Clark*, 81 Fed. 269 (8 Cir., 1897) (street railway);
>
> *Atlantic Trust Co.* v. *Woodbridge Canal & Irrigation Co.*, 79 Fed. 39 (C. C. N. D. Cal., 1897) (irrigation company);
>
> See FitzGibbon, *The Present Status of the Six Months' Rule*, 34 Colum. L. Rev. 230, 233 n. 8 (1934).

In one instance, the Court of Appeals for the Second Circuit applied the six months rule to a hotel that was undergoing reorganization under Chapter X of the Bankruptcy Act. The Court predicated the extension of the doctrine in that case on the ground that the continued operation of such an enterprise depended upon good will, the preservation of which was necessary to maintain the value of the lienholders' security.

> *Dudley* v. *Mealey*, 147 F. 2d 268, 271 (2 Cir.) *cert. denied* 325 U. S. 873 (1945).

Subsequently, however, the same Court of Appeals declared that the "rule should be strictly contained within

narrow confines and limited to the purposes which brought it into being," because it was an "invasion of the established contract rights of lienholders".

Johnson Fare Box Co. v. *Doyle,* 250 F. 2d 656, 657 (2 Cir.) *cert. denied* 357 U. S. 938 (1958).

Irrespective of the origin or rationale of the rule, the question of its application in a Chapter XI proceeding has posed no problem for any of the courts which have dealt with it.

In large measure, this unanimity of result has stemmed from the clarity of the statutory mandate. As the Court of Appeals pointed out in its decision (Appendix B, p. 20, of petition for writ) below, Section 77 relating to railroad reorganizations in subdivision (b) thereof provided that "unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors; . . ." The Court indicated that this clearly included the rule of *Fosdick* v. *Schall, supra.*

Section 102 of Chapter X of the Bankruptcy Act, the Corporate Reorganization chapter, uses language that expressly excludes the application of the priority section (64a) of Chapters I-VII of the Bankruptcy Act.

In contradistinction to the provisions of Section 102, Section 302 of Chapter XI, the Arrangement chapter, incorporates all of the provisions of Chapters I-VII of the Act, except insofar as they may be inconsistent with or in conflict with the provisions of Chapter XI. No such inconsistency or conflict can possibly be demonstrated in the instant case and Section 64 is applicable.

This leaves open only the matter of the propriety of the lower court's decision that section 64a(5) does not afford to Pennsylvania the priority which it seeks. Section 64a(5) provides for priority to

> "(5) debts owing to any person, including the United States, who by the laws of the United States in [sic.] entitled to priority . . ."

Pennsylvania argued that the equitable doctrine of *Fosdick* v. *Schall, supra*, is a law of the United States, thereby entitling its claim to priority under Section 64a(5).

The Court of Appeals has effectively disposed of this argument (Appendix B, p. 21, petitioner's writ) and held that "laws" means "statutes, not doctrines judicially evolved."

We respectfully submit that no convincing reason has been adduced to justify further review by this Honorable Court of the result which has consistently been reached by all of the Courts which have decided this matter.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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